

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 14606 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

ZARINABEN AHMED PATEL

Versus

UNION OF INDIA (DELETED)

Appearance:

1. Special Civil Application No. 14606 of 2004
MR MIHIR H.JOSHI, SR. ADVOCATE WITH MS AMRITA M THAKORE
for Petitioner
DELETED for Respondent No. 1
MR KM PARIKH for Respondent No. 2-3
NOTICE SERVED BY DS for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 26/04/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. This petition challenges legality, validity and propriety of (1) order dated 15th September 2004 passed by Chief Commissioner of Income Tax, Baroda under Section 119(2)(a) read with Sections 234A, 234B and 234C of the Income Tax Act, 1961 (the Act); (2) order dated 28th September 2004 made by Assistant Commissioner of Income Tax levying penal interest under Section 220(2) of the Act for assessment years 1988-89, 1989-90 and 1990-91; (3) order of attachment dated 11th January 2000 attaching immovable properties; and (4) notice of recovery dated 28th October 2004 issued by Tax Recovery Officer for assessment years 1988-89, 1989-90 and 1990-91.

2. Heard Mr.Mihir H.Joshi, the learned Senior Advocate with Miss A.M.Thakor appearing on behalf of petitioner. Rule. Mr.K.M.Parikh, the learned standing counsel waives service of rule. With consent of the learned advocates for the parties, the petition is taken up for final hearing and disposal today.

3. It is submitted that late father of the petitioner - Shri Umarji Musa Rangoonvala had gone to U.K. and after staying there for eight months, had returned to India on 6th February 1992. That search and seizure operations were carried out under Section 132 of the Act at the residential premises of late Shri Umarji. That at the time of the said proceedings, late Shri Umarji had accepted investment to the tune of Rs.10 to 12 lakhs in immovable property, but apart from the said statement, no incriminating documents were recovered in course of the said proceedings. It was, therefore, urged that, in such circumstances, the returns of income for assessment years 1988-89, 1989-90 and 1990-91 filed respectively on 3rd February 1993, 1st March 1993 and 4th March 1993 were voluntary in nature. That there being no detection, even on that count the returns be treated as voluntary returns. He further submitted that the petitioner had cooperated in finalisation of assessment proceedings and paid taxes. Therefore, it was urged that the petitioner was covered by circular notification F.No.400/234/95-IT (B) dated 23rd May 1996 and respondent No.2, namely CIT was in error in refusing to waive interest charged under Sections 234A, 234B and 234C of the Act.

4. Mr.K.M.Parikh, the learned standing counsel

appearing on behalf of respondents placed reliance on the affidavit in reply dated 25th January 2005 and submitted that, as per the chart annexed to the said affidavit, it was apparent that returns had been filed belatedly and none of the conditions stipulated by the board circular were shown to have been satisfied entitling the petitioner to any relief. He therefore urged that the CIT was justified in rejecting the waiver application for assessment years 1989-90 and 1990-91.

5. As can be seen from the impugned order made by Chief CIT, Baroda, he has recorded that the petitioner had filed the returns only after issuance of notices under Section 148 of the Act; that assessments were completed under Section 144 of the Act as the petitioner did not cooperate during assessment proceedings; and assessee did not pay any advance tax and paid taxes only after regular final assessments. It is further recorded in the order that unexplained investment in the house property was detected during search and there was no voluntary disclosure. In other words, even in the returns of income filed after issuance of notices under Section 148 of the Act, there was absence of full and true disclosure of investment in the property. He accordingly rejected the application seeking waiver of interest as the case of the petitioner did not fall within the parameters laid down by circular dated 23rd May 1996.

6. The circular issued by CBDT under Section 119(2)(a) of the Act authorising Chief Commissioner and Director General (Investigation) to reduce or waive interest under Sections 234A, 234B and 234C of the Act, states in paragraph No.1 that the said authorities may reduce or waive interest in the classes of cases or classes of income specified in paragraph No.2 of the circular order for the period and to the extent the authority may deem fit. However, no reduction or waiver of interest is permissible unless an assessee has filed return of income for the relevant assessment year and paid the entire tax due on the income as assessed except the amount of interest for which reduction or waiver has been requested for. Paragraph No.2 of the circular stipulates the following class of incomes or class of cases :

"2. The class of incomes or class of cases in which the reduction or waiver of interest under section 234A or section 234B or, as the case may be, section 234C can be considered, are as follows:

- (a) Where during the course of proceedings for search and seizure under section 132 of the Income-tax Act, or otherwise, the books of account and other incriminating documents have been seized and for reasons beyond the control of the assessee, he has been unable to furnish the return of income for the previous year during which the action under section 132 has taken place, within the time specified in this behalf and the Chief Commissioner or, as the case may be, Director-General is satisfied having regard to the facts and circumstances of the case that the delay in furnishing such return of income cannot reasonably be attributed to the assessee.
- (b) Where during the course of search and seizure operation under section 132 of the Income-tax Act, cash is seized which is not allowed to be utilised for seizure of cash and the assessee has not paid fully or partly advance tax on the current income and the Chief Commissioner or the Director - General is satisfied that the assessee is unable to pay the advance tax.
- (c) Where any income chargeable to income-tax under any head of income, other than "Capital gains" is received or accrues after the due date of payment of the first or subsequent installments of advance tax which was neither anticipated nor was in the contemplation of the assessee and the advance tax on such income is paid in the remaining instalment or installments and the Chief Commissioner or Director - General is satisfied on the facts and circumstances of the case that this is a fit case for reduction or waiver of interest chargeable under section 234C of the Income Tax Act.
- (d) Where any income which was not chargeable to income tax on the basis of any order passed in the case of an assessee by the High Court within whose jurisdiction he is assessable to income-tax, and as a result, he did not pay income tax in relation to such income in any previous year and subsequently, in consequence of any retrospective amendment of law or, as the event has taken place after the end of any such previous year, in any assessment or reassessment proceedings the advance tax paid by the assessee

during the financial year immediately preceding the relevant assessment year is found to be less than the amount of advance tax payable on current income, the assessee is chargeable to interest under section 234B or section 234C and the Chief Commissioner or Director - General is satisfied that this is a fit case for reduction or waiver of such interest.

(e) Where a return of income could not be filed by the assessee due to unavoidable circumstances and such return of income is filed voluntarily by the assessee or his legal heirs without detection by the Assessing Officer."

7. As can be seen from condition (a), in the eventuality where books of accounts and other documents are seized during proceedings under section 132 of the Act and in absence of such books or documents, it is not possible for an assessee to furnish the return, the authority would be justified after recording necessary satisfaction in the facts of a case that delay in furnishing return of income cannot reasonably be attributed to the assessee. It is admitted position that this condition is not applicable to the facts of the present case.

7.1 Condition specified in clause (b) regarding not allowing utilisation of seized cash for payment of advance tax installment is also not applicable in the facts of the present case.

7.2 Similarly, condition vide clause (c) regarding income under the head "capital gains" is also not applicable to the facts of the present case.

7.3 It is not even the petitioner's case that condition laid down in sub-clause (d) is applicable to the facts of the case.

7.4 The only case that petitioner has urged is fulfillment of condition under clause (e). In the application moved before Chief CIT, it is stated that the petitioner could not file return of income due to unavoidable circumstances and such return of income was filed voluntarily. However, as to what were the unavoidable circumstances is nowhere spelt out - neither in the application moved before the Chief CIT nor during course of hearing. Therefore, even if for the sake of argument it is accepted, as contended, that the returns of income were filed voluntarily, the second limb of the

condition having not been fulfilled, the petitioner cannot claim benefit under the Circular.

8. It is necessary to take note of the fact that returns for assessment years 1988-89, 1989-90 and 1990-91 were due on 30th September 1988, 30th August 1989 and 30th August 1990 respectively. As against that, as already noted, the returns of income for the three years were respectively filed on 3rd February 1993, 1st March 1993, and 4th March 1993. The petitioner has, therefore, failed to show as to what prevented the petitioner from filing returns of income by due dates.

9. The petitioner has also failed to show why advance tax for each of the year under consideration was not paid. This becomes material in light of the fact that the petitioner has also sought waiver of interest levied under Sections 234B and 234C of the Act. Admittedly, even after giving effect to the order of the Tribunal, the petitioner is left with positive income and is called upon to make payment of tax. Hence, the default in not making payment of advance tax survives and as already recorded, none of the conditions on the basis of which advance tax could be waived is fulfilled. Even if, as contended by the petitioner, the aforesaid conditions are treated to be illustrative in nature and not exhaustive, no explanation is forthcoming as to why no advance tax was paid on due dates during the relevant accounting periods.

10. As already recorded, the assessments were framed under Section 144 of the Act, namely the assessments were best judgement assessments. In these circumstances, the contention of the petitioner that the petitioner had cooperated in finalising the assessments cannot be accepted.

11. The contention that during course of Section 132 proceedings, nothing incriminating was recovered loses sight of the fact that the residential property itself was an unexplained investment. The only relief that has become available after successive appeals before the C.I.T. (Appeals) and the Tribunal is as to quantum of unexplained investment. Hence, the petitioner is not justified in stating that no incriminating documents were recovered. In fact, neither side has placed on record the loose papers recovered at the time of search.

12. In the result, the petitioner has failed to make out any case for interfering with the impugned order made by Chief CIT on 15th September 2004, rejecting the

application for waiver of interests for assessment years 1989-90 and 1990-91 under Sections 234A, 234B and 234C of the Act.

13. Once it is found that the petitioner had no case for waiver or reduction of interest, and the petitioner having failed to make payment of the amount of tax demanded vide notice under Section 156 of the Act, interest becomes chargeable under Section 220(2) of the Act. The provision is mandatory in terms and it is an admitted position that the petitioner has not paid the amount of interest charged under the various provisions of the Act for different defaults as per notice of demand under Section 156 of the Act. In the circumstances, there is no infirmity in the order made by respondent No.3, Assistant Commissioner of Income Tax on 28th September 2004.

14. As a natural corollary or consequence, the recovery notice dated 28th October 2004 issued by respondent No.4, Tax Recovery Officer also cannot be faulted. In so far as the challenge to order of attachment dated 11th January 2000 is concerned, not only the petitioner was not in a position to show how the said order is wrong, but even on facts, once the authorities find that large amount of tax / interest is due and remains outstanding, the authorities would be justified in taking the necessary steps in accordance with law to effect recovery of the outstanding dues - attachment being one of the modes of recovery.

14. In the result, the petition is required to be rejected there being no infirmity in the actions of the respondent authorities. Accordingly, rule is discharged. Ad-interim relief granted earlier stands vacated. No order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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